Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372,
A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

THE OAKLAND PRESS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT THE OAKLAND PRESS COMPANY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision below of the National Labor Relations Board, enforced by the Sixth Circuit Court of Appeals, that the Company's newspaper carriers are "employees" and that the Company's district managers are "supervisors" expressly excluded from coverage under the National Labor Relations Act, has warrant in the record and a reasonable basis in law?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT THE OAKLAND PRESS COMPANY'S BRIEF IN OPPOSITION

To The Honorable, The Chief Justice Of The United States Supreme Court And The Associate Justices Of The Supreme Court Of The United States:

Respondent The Oakland Press Company* respectfully prays that a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case be denied.

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* The listing of Respondent's parent and affiliated companies required by Rule 28.1 is set forth as an Appendix hereto.

STATEMENT OF THE CASE

A. Factual Background

On February 24, 1970, the Petitioner (hereinafter the Union) filed a petition with the National Labor Relations Board ("Board") seeking certification as the exclusive bargaining representative for the Respondent, The Oakland Press Company's (hereinafter the Company) circulation department district managers. (Pet. App. A-53).[1] Subsequently, the Company and the Union entered into a consent election agreement which provided that the Company's news carriers were nonemployees and that the district managers who directed their activities therefore were not supervisors under Section 2(11) of the National Labor Relations Act ("Act"). (Pet. App. A-53). A Regional Director of the Board, however, refused to place the Board's imprimatur upon the consent election agreement because of the uncertainty clouding the actual employee status of the newspaper carriers and thus the supervisory status of the district managers, and instead submitted the issue of the carriers' and district managers' statuses under the Act to the Board. (Pet. App. A-53). Before the Board could address this issue, however, the Union withdrew its petition and instead sought certification as the bargaining representative for the Company's district managers from the Michigan Employment Relations Commission. (Pet. App. A-53). An election was held, the Union was certified under Michigan law as the district manager's bargaining representative, and two successive collective bargaining agreements were negotiated between the Company and the Union. (Pet. App. A-53). In May, 1976—after the latter agreement had expired—a question arose over the Company's obligation to bargain with the Union. The Union reacted by filing an unfair labor practice charge accusing the Com-

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[1] References to the Petition for Writ of Certiorari are herein cited as (Pet. ——); references to the Petitioner's Appendix are cited as (Pet. App. ——).

pany of refusing to bargain in violation of Section 8 (a)(5) of the Act. 29 U.S.C. § 158(a)(5). The Company's defense to this charge was predicated upon its conviction—ultimately vindicated by the Board and the Sixth Circuit Court of Appeals—that its news carriers were employees and consequently that the district managers which directed their activities were supervisors unentitled to statutory bargaining rights. (Pet. App. A-53).

The Company, which is in the business of publishing and distributing The Oakland Press, circulates its newspaper to home subscribers through approximately 1,250 youth carriers and 35-40 adult motor route carriers. (Pet. App. A-41). These carriers are responsible to one of fifteen district managers who in turn are responsible to two zone managers. (Pet. App. A-41).

The carriers are hired by a district manager to make deliveries to home subscribers along a prescribed route. (Pet. App. A-41). Applicants for carrier routes are required to sign an agreement which provides, *inter alia*, that (1) the carrier has "the exclusive right" to service all home subscribers within a fixed territory; (2) the carrier will sell the Oakland Press to all home subscribers along the particular route "at the established rate"; (3) the carrier will do all in his power to promote and increase the circulation of the Oakland Press; (4) the carrier is forbidden to deliver any other newspaper or printed matter absent the Company's authorization; (5) the carrier will furnish a substitute when he personally is unable to make his deliveries; (6) the carrier must regularly and promptly pay the "established wholesale price" to the Company for all copies of the Oakland Press he orders; and (7) either party can terminate the agreement for any reason upon 30 days' notice and the Company can terminate the agreement "without notice for good and sufficient reason." (Pet. App. A-41-A-42).

Pursuant to the terms of the agreement, the carriers sell the newspaper at subscription rates fixed by the Company. (Pet. App. A-42). Where particular routes have too few subscribers to generate enough money to attract and retain carriers, the Company subsidizes the route by providing extra compensation to carriers who deliver these routes. (Pet. App. A-42).

Carriers are expected to participate in promotional campaigns undertaken by the Company, and are rewarded with prizes or trips for their efforts in generating new subscribers. (Pet. App. A-42). When the Company extends "money back guarantees" to new subscribers, it is the Company and not the carrier that bears this financial obligation. (Pet. App. A-42). Although carriers are billed even in the event of non-delivery for all newspapers ordered, the Company supplies carriers with substitute copies at no cost for all papers that are damaged or lost for any reason. (Pet. App. A-43).

The Company pays a portion of the premium for a carrier's accident insurance if a carrier requests such coverage. (Pet. App. A-43). In accordance with express statutory exemptions under federal and state law, the Company does not deduct Social Security or income taxes from carrier paychecks.[2] (Pet. App. A-43).

Carriers have no proprietary interest in their routes. (Pet. App. A-43). The Company provides carriers with collection cards, routebooks and newspaper delivery tubes in which the carriers are required to deposit the newspapers they deliver. (Pet. App. A-43). Suburban carriers receive a vehicle allowance which is determined by the district manager on the basis of the mileage covered along a particular route. (Pet. App. A-43). This mileage determination is made by the district manager while accompanying the carrier on his route. (Pet. App. A-43).

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[2] *See* 26 U.S.C. § 3121(b)(14)(A) and (B); 26 U.S.C. § 3306 (c)(15)(A) and (B); M.C.L.A. § 141.606; M.C.L.A. § 421.43(p).

The district manager "sees to it that the carriers perform their duties properly." (Pet. App. A-43). District managers instruct newly hired carriers with respect to delivery method, collections and participation in promotional campaigns. (Pet. App. A-43). Thereafter, the district managers monitor the various aspects of the carriers' performance, and approximately 30 percent of them require special attention. (Pet. App. A-43-A-44). District managers closely monitor the carriers with regard to collections and will accompany a carrier to the home of a delinquent subscriber to assist in clearing up the arrearage. (Pet. App. A-44).

District managers respond to subscriber complaints concerning poor service or litter at bundle drop locations by speaking with the carrier and telephoning or visiting the subscriber. (Pet. App. A-44). District managers also handle carrier complaints regarding subscribers. (Pet. App. A-44).

Carriers are expected to provide substitutes that must be satisfactory to the district manager and the latter is ultimately responsible for securing a suitable substitute when the carrier fails to do so. (Pet. App. A-44). If the substitute is inexperienced, the district managers provide instruction pertaining to "the rules regarding proper delivery and collections." (Pet. App. A-44).

The district managers have the discretion to split, consolidate and establish the boundaries of routes. (Pet. App. A-44). District managers also transfer carriers among different routes and recommend carriers for special recognition and eligibility in a paid scholarship program sponsored by the Company. (Pet. App. A-44). District managers also are empowered to make carrier firing decisions. (Pet. App. A-44-A-45).

B. Course of Proceedings

The protracted history of this case began on January 5, 1977, when Administrative Law Judge ("ALJ") James L. Rose issued a decision—subsequently affirmed

by the Board in a decision dated May 6, 1977—which failed to classify the newspaper carriers as either employees or independent contractors. While admitting that the newspaper carriers were not independent contractors, Judge Rose ruled that the newspaper carriers were "not employees" as a "matter of policy." (Pet. App. A-26). Since the district managers must supervise "other employees" to meet the statutory definition of a supervisor, Judge Rose ruled that the district managers were not supervisors under the Act. Judge Rose's invention of a mysterious and unexplicated policy was a radical departure from Board precedent which has always classified newspaper carriers as either employees or independent contractors under traditional common law agency concepts.

The Company petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's ruling. The Board filed a cross-application for enforcement of that ruling. The Sixth Circuit denied the Board's enforcement application and granted the Company's petition on October 4, 1979. (Pet. App. A-6-A-14). The court clearly was alarmed by the Board's departure from its prescribed jurisdictional authority under the Act, and refused to sanction the Board's "policy" judgment—which, in essence, amounted to an administrative redrafting of Sections 2(3) and 2(11) of the Act. *See* 29 U.S.C. §§ 152(3), 152(11). It declared:

> We cannot accept the finding that, as a matter of policy, [the Company's carriers] are not employees. Whose policy? *They are entitled to be definitely classified under the statute. Either they are legally employees or, according to law, they are not employees.*

(Pet. App. A-14) (emphasis added). Thus, the court remanded the case to the Board for its determination of the legal status of the Company's carriers under the Act. (Pet. App. A-14).

On remand, the Board rendered a supplemental decision and order in which it determined that the Company's carriers were employees and the Company's district managers were supervisors under the Act. (Pet. App. A-40-A-50). In addressing the threshold question of whether the Company's carriers were employees or independent contractors under the Act, the Board made extensive findings of fact regarding the Company's relationship vis-a-vis its carriers. (Pet. App. A-41-A-45). The Board then applied the traditional "right to control" test in ascertaining the carriers' status as employees under the Act. (Pet. App. A-45).[3] As is invariably the case in these determinations, the Board observed that the Company's relationship with its carriers exhibited characteristics reflective of both an employer-employee relationship and an employer-independent contractor relationship. (Pet. App. A-45-A-47). The Board stressed, however, that the factors indicative of an employer-independent contractor relationship were "clearly outweighed" by those factors which conclusively demonstrated that the relationship between the Company and its carriers was one of employer-employee. (Pet. App. A-46-A-47). Summarizing the evidence before it, the Board held that

> In view of the substantial control by the district managers over the carriers, the absence of the proprietary interest on the part of the carriers, their insulation from most losses, and the limited opportunity for significantly increasing their income, we now reverse our earlier finding and conclude in the light of the Board's more recent Decisions that the

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[3] Under the "right to control" test as consistently articulated by the Board, "an employer-employee relationship exists when the employer reserves the right to control not only the result to be achieved but also the means to be used in attaining the result." By way of contrast, an independent contractor relationship exists when the employer reserves the right only to control the ultimate result to be achieved. (Pet. App. A-45).

> carriers are employees within the meaning of the Act.

(Pet. App. A-47) (footnote omitted). Moreover, since the Board declared that "[i]t is clear . . . that the district managers hire, discharge, assign, transfer, and responsibly direct the carriers whom we have found to be employees," the district managers were adjudged to be "supervisors" explicitly excluded from the coverage of the Act. (Pet. App. A-47). The Board thus vindicated the Company's position in declining to bargain with the Union representing its district managers. (Pet. App. A-47).

The Union appealed the Board's supplemental decision and order to the Sixth Circuit Court of Appeals. In an opinion issued on June 29, 1982, the Sixth Circuit affirmed, stating that "there is no question but that the [Board's determination that the carriers were employees and the district managers supervisors] does have substantial support" in the record as a whole. (Pet. App. A-16). The court, however, remanded the case back to the Board for "the limited purpose" of ascertaining whether principles of equitable estoppel could be invoked to preclude the Company from maintaining that its carriers were employees and its district managers supervisors under the Act. (Pet. App. A-18, A-3). Circuit Judge Boyce F. Martin, Jr. dissented from the court's remand order, however, since in his opinion he "d[id] not feel that there is any evidence whatsoever that equitable estoppel may be claimed by the [Union]." (Pet. App. A-19).

Judge Martin's dissent proved prophetic. In a second supplemental decision issued on February 7, 1983, the Board unanimously rejected the Union's equitable estoppel claim. (Pet. App. A-51-A-55). On appeal before the Sixth Circuit, the Union's equitable estoppel claim met an identical fate. (Pet. App. A-1-A-5). The Union next petitioned the Sixth Circuit for a rehearing and suggested a rehearing *en banc* regarding the specific issue

upon which the Union presently seeks review before this Court. Significantly, not a single judge in active service with the Sixth Circuit moved for rehearing *en banc*, and the court summarily denied the Union's petition. (Pet. App. A-58).

SUMMARY OF ARGUMENT

The decision below of the National Labor Relations Board, enforced by the Sixth Circuit Court of Appeals, that the Company's newspaper carriers are "employees" and that the Company's district managers are "supervisors" expressly excluded from coverage under the National Labor Relations Act has warrant in the record and a reasonable basis in law. Petitioner is seeking an invitation to re-litigate before this Court an issue which has been exhaustively investigated and correctly decided by the Board and the Sixth Circuit on the basis of a voluminous record generated by seven years of fact-finding and litigation. The invitation should be withheld.

This case is completely unremarkable and does not merit this Court's review. It involves the Board's application of well-established agency principles to a discrete fact situation and hence will affect few—if any—other litigants. Indeed, a plethora of newspaper carrier cases addressing the same basic issue upon which the Petitioner seeks review before this Court invariably have underscored the ad hoc nature of its resolution.

Petitioner's assertion of an implied exclusion for newspaper carriers is unsound and conflicts with Congressional intent and well-settled rules of statutory construction. Congress, in defining the term "employee" in Section 2(3) of the Act, established six explicit exclusions from that definition. Conspicuously absent from this list is any exclusion for "newspaper carriers." It is telling that Congress has exhibited its ability to draft a newspaper carrier exemption to federal labor legislation when it has chosen to do so. *See* Section 13(d) of the Fair Labor Standards Act.

Lastly, the rulings below that the district managers are statutory supervisors are completely in accord with Congressional intent and long-standing Board and judicial authority. This Court has proclaimed that Congress' intention in enacting Section 14(a) of the Act was to relieve employers from any compulsion to recognize and bargain with a union of supervisory employees. Consequently, although Section 14(a) specifically permits employers to recognize and bargain with units of supervisors, it unambiguously and categorically removes any legal obligation on behalf of an employer to continue that relationship if undesired.

REASONS FOR DENYING THE WRIT

I. The Decision Below Of The National Labor Relations Board, Enforced By The Sixth Circuit Court Of Appeals, That The Company's Newspaper Carriers Are "Employees" And That The Company's District Managers Are "Supervisors" Expressly Excluded From Coverage Under The National Labor Relations Act Has Warrant In The Record And A Reasonable Basis In Law.

This Court long has underscored the deference that should attach to a Board's determination that certain workers are "employees" under the Act. Specifically, this Court has admonished the courts of appeals that Board judgments in this regard should be honored so long as they have warrant in the record as a whole and a reasonable basis in law. *E.g., Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303-04 & n.14 (1977); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). Moreover, when a Board decision grounded in its construction of the Act has garnered the approval of the reviewing court of appeals, the prudence of this Court's reluctance to intercede obviously waxes even more compelling. *See, e.g., Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978); *Golden*

State Bottling Co., Inc. v. NLRB, 414 U.S. 168, 172-73 (1973); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

In the instant case, Petitioner is seeking to litigate anew in this forum an issue which has been fully explored and correctly decided by the Board and Sixth Circuit on the basis of an exhaustive record borne of seven years of fact-finding and litigation. Petitioner has failed to advance any persuasive reasons that would justify this Court's grant of certiorari in the instant case.

A. *This case is unremarkable since it involves the Board's application of well-established agency principles to a very particularized fact situation and hence will affect few, if any, other litigants.*

Section 2(3) of the Act, 29 U.S.C. 152(3), explicitly excludes "any individual having the status of an independent contractor" from the definition of "employee" under the Act.[4] This explicit displacement of independent contractors from the scope of the Act was undertaken in the 1947 Taft-Hartley amendments to the Act which sought, *inter alia*, to legislatively override an expansive formulation of the term "employee" that had been developed by the Board and sanctioned by the Supreme Court

[4] 29 U.S.C. § 152(3) provides in full that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). *See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-67 (1971); *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968).

Although the pre-1947 definition of "employee" was devoid of the explicit independent contractor exclusion, the Board historically had placed independent contractors beyond the purview of the Act and had relied principally upon the common law "right to control" test to distinguish employees from independent contractors. *See, e.g., Klement Timber Co.*, 59 N.L.R.B. 681 (1944); *Field Packing Co.*, 48 N.L.R.B. 850 (1943). In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), however, the Board embraced a more aggressive, policy-oriented test for ascertaining "employee" relationships under the Act and thus relegated the traditional common law "right to control" test to step-child status. There the Board found newsboys distributing newspapers on street corners to be the "employees" of various newspaper publishers purely on the basis of policy considerations. Specifically, the Board had concluded that the relationship between the newsboys and the publishers exhibited sufficient economic dependence to warrant extending the Act's protections to these newsboys. The Ninth Circuit Court of Appeals denied enforcement of the Board's ruling, however, holding that Congress had intended for the term "employee" to be "given its conventional meaning as developed under the common law and statutory enactments," i.e., in accordance with the "right to control" test utilized by the Supreme Court in determining "employee" status under various other federal statutes. *Hearst Publications, Inc. v. NLRB*, 136 F.2d 608, 612-13 (9th Cir. 1943). The court explained:

> Such a result is in accord with the basic theory of statutory interpretation that the legislature is presumed to use words in their ordinary sense unless

> that sense is contradicted by the context of the statute. Since the principle is a long established one, it would seem that if Congress had intended to enlarge upon the common meaning of "employee," it would have specifically so stated in the Act, which sets out specific definitions to several terms used in the Act.

Id. at 612 (citations omitted). Utilizing the traditional common law "right to control" test, the court held that the evidence in the record was insufficient to support the Board's ruling that the newsboys were "employees" of the publishers under the Act. *Id.* at 613-14.

The Supreme Court reversed the Ninth Circuit's holding and reinstated the Board's order. The Court rejected as inappropriate the application of the common law "right to control" test to ascertain coverage under national labor legislation, and announced instead that the definition of "employee" under the Act must be distilled "from the history, terms and purposes of the legislation." 322 U.S. 111, 124. The Court stated that, in individual cases, the concept of "employee" must be referenced to the actual economic relationship of the parties in light of the Act's purpose and that "[w]here all the conditions of the relation require protection, protection ought to be given." *Id.* at 129 (citation omitted). The Court deemed it unnecessary to formulate a precise definition of "employee" that would control in future cases, however, reasoning that such a task would be best suited for Board resolution on the basis of its amassed expertise. *Id.* at 130.[5]

Congressional reaction to the *Hearst* decision was swift and vehement. In the Taft-Hartley amendments of 1947,

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[5] Justice Roberts authored the lone dissenting opinion which, in light of subsequent legislative events, carries particular significance. Justice Roberts essentially espoused the position reflected in the Ninth Circuit's majority opinion below, declaring that it was "[c]lear [that] Congress did not delegate to the National Labor Relations Board the function of defining the relationship of employment so as to promote what the Board understood to be the underlying purpose of the statute." 322 U.S. at 135-36.

Congress legislated against what it perceived to be "a disregard by the Board of the clear statutory language and an abdication by the Court of its functions in reviewing Board decisions." R. Gorman, *Basic Text on Labor Law*, at 29 (1977). By enacting an amendment explicitly excluding "any individual having the status of an independent contractor" from the definition of "employee" in Section 2(3) of the Act, Congress "thereby imported the common law 'right to control' test as a standard of statutory coverage." *Id.* As this Court acknowledged in *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968), "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." [6] Unquestionably, then, the operative

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[6] The House Report on the amendment which ultimately was enacted to expressly exclude "independent contractors" from the scope of Section 2(3)'s definition of "employee" provided:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees." The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. *It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake*

standard to be employed in distinguishing employees and independent contractors under the Act is the traditional "right to control" test borne of common law agency principles. Congress has spoken very clearly on this score, and the message obviously has been received by this Court, the Board and the various circuit courts of appeals.[7]

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*to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. * * * To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contrators" from the definition of "employee."*

H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947) (emphasis added).

[7] *See, e.g., NLRB v. United Insurance Co.*, 390 U.S. 254 (1968); *Broadway Cab Cooperative, Inc. v. Teamsters & Chauffeurs Local Union No. 281, IBT*, 710 F.2d 1379, 1381 (9th Cir. 1983); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 918-19 (11th Cir. 1983); *Hilton International Co. v. NLRB*, 690 F.2d 318, 320 (2d Cir. 1982); *Air Transit, Inc. v. NLRB*, 679 F.2d 1095, 1098 (4th Cir. 1982); *St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759, 760 (8th Cir. 1982) (newspaper carrier case; "[i]t is well settled that 'the distinction between employees and independent contractors must be made by the application of general agency principles on a case-by-case basis.' ") (citations omitted); *Building Material and Dump Truck Drivers v. NLRB*, 669 F.2d 759, 764 (D.C. Cir. 1981); *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57, 60 (1st Cir. 1981) ("It is well-established that general principles of agency law govern the distinction between employee and independent contractor for purposes of the Act.") (citations omitted); *NLRB v. Tri-State Transport Corp.*, 649 F.2d 993, 994 (4th Cir. 1981); *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3d Cir. 1979); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596, 597 (1st Cir. 1974) ("It is settled that the Board and courts are to apply general principles of agency law in distinguishing employees from independent contractors. In 1947 Congress passed an amendment to the Act specifically excluding independent contractors from the definition of 'employee' so that determinations on this question would be based on ordinary tests of the common law rather than on the Board's

Under the "right to control" test, there is no talismanic formula that can be relied upon to differentiate employees from independent contractors. Rather, there is a multi-faceted inquiry undertaken into all aspects of the parties' relationship and "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *NLRB v. United Insurance Co.*, 390 U.S. at 258. Characteristically, analysis of such relationships will reveal factors reflective of both employee and independent contractor status and a balancing process will be employed to resolve the issue—as was done in the instant case. *The Oakland Press Co.*, 249 N.L.R.B. 1081 (1980) (Pet. App. A-40-A-47). *Accord, Abell Publishing Co.*, 270 N.L.R.B. No. 181, 116 L.R.R.M. 1284, 1286 (1984); *Fort Wayne Newspapers, Inc.*, 263 N.L.R.B. 854, 855 (1982); *Philadelphia Newspapers, Inc.*, 238 N.L.R.B. 835, 836 (1978).

Consequently, it is not surprising that "[i]n past cases involving the newspaper industry, the resolution of the question of whether carriers are employees or independent contractors has turned on the specific facts in each case." *Philadelphia Newspapers, Inc.*, 238 N.L.R.B. 835, 836 (1978).[8] Depending upon the peculiarities of the re-

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view of policy considerations embodied in the Act.") (citations omitted); *NLRB v. Deaton, Inc.*, 502 F.2d 1227 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975); *Ace Doran Hauling & Rigging Co. v. NLRB*, 462 F.2d 190, 193 (6th Cir. 1972); *NLRB v. Pepsi Cola Bottling Co.*, 455 F.2d 1134, 1137 (6th Cir. 1972); *Meyer Dairy, Inc. v. NLRB*, 429 F.2d 697, 701 (10th Cir. 1970); *Fort Wayne Newspapers, Inc.*, 263 N.L.R.B. 854, 855 (1982); *The Herald Star, Canton Division, Thomson Newspapers, Inc.*, 227 N.L.R.B. 505, 507 (1976); *El Mundo, Inc.*, 167 N.L.R.B. 760, 761 (1967).

[8] *Accord, Brown v. NLRB*, 462 F.2d 699, 702 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972) ("Since the facts in each case are largely determinative, the Board's rulings in comparable newspaper dealer cases are not uniform."); *NLRB v. Brush-Moore News-*

lationship between a newspaper publisher and the individuals who distribute its newspaper, the courts and the Board have determined that newspaper distributors/carriers have been employees in some cases,[9] and independent contractors in others.[10] Thus, the instant case merely represents one decision among a plethora of cases addressing the employee vs. independent contractor status

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papers, Inc., 413 F.2d 809, 812 (6th Cir. 1969); *NLRB v. A. S. Abell Co.*, 327 F.2d 1, 4-5 (4th Cir. 1964); *Abell Publishing Co.*, 270 N.L.R.B. No. 181, 116 L.R.R.M. 1284, 1286 (1984).

[9] *E.g., St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759 (8th Cir. 1982); *News Journal Co. v. NLRB*, 447 F.2d 65 (3d Cir. 1971); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969); *NLRB v. Lindsay Newspapers, Inc.*, 315 F.2d 709 (5th Cir. 1963); *Drukker Communications, Inc.*, 258 N.L.R.B. 734, 744-46 (1981); *The Virginian Pilot/Ledger Star, Capital Division of Landmark Communications, Inc.*, 241 N.L.R.B. 575 (1979); *Philadelphia Newspapers, Inc.*, 238 N.L.R.B. 835 (1978); *The Herald Star, Canton Division, Thomson Newspapers*, 227 N.L.R.B. 505, 506-07 (1976); *Federated Publications, Inc.*, 218 N.L.R.B. 151 (1975); *Beacon Journal Publishing Co.*, 188 N.L.R.B. 218 (1971); *The News-Journal Co.*, 180 N.L.R.B. 864 (1970); *San Antonio Light Division, The Hearst Corp.*, 174 N.L.R.B. 934 (1969) (*San Antonio III*); *El Mundo, Inc.*, 167 N.L.R.B. 760 (1967); *News Syndicate Co., Inc.*, 164 N.L.R.B. 422 (1967); *San Antonio Light Division, The Hearst Corp.*, 167 N.L.R.B. 689 (1967) (*San Antonio II*); *The Sacramento Union*, 160 N.L.R.B. 1515 (1966); *Eureka Newspapers, Inc.*, 154 N.L.R.B. 1181 (1965); *The Vindicator Printing Co.*, 146 N.L.R.B. 871 (1964); *San Antonio Light Division, The Hearst Corp.*, 130 N.L.R.B. 619 (1961) (*San Antonio I*); *Buffalo Courier-Express, Inc.*, 129 N.L.R.B. 932 (1960); *P.G. Publishing Co.*, 114 N.L.R.B. 60 (1955).

[10] *E.g., Brown v. NLRB*, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972); *NLRB v. A. S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); *Abell Publishing Co.*, 270 N.L.R.B. No. 181 (1984); *Fort Wayne Newspapers, Inc.*, 263 N.L.R.B. 854 (1982); *Donrey, Inc.*, 223 N.L.R.B. 744 (1976); *Las Vegas Sun, Inc.*, 219 N.L.R.B. 889 (1975); *Stockton Daily Record*, 71 L.R.R.M. 1613 (Reg. Dir., 20th Reg., 1969); *The Pulitzer Publishing Co.*, 146 N.L.R.B. 302 (1964); *Carter Publications, Inc.*, 100 N.L.R.B. 599 (1952); *The Times Herald Printing Co.*, 94 N.L.R.B. 1785 (1951); *The Kansas City Star Co.*, 76 N.L.R.B. 384 (1948).

of newspaper distribution personnel that invariably have been premised upon an ad hoc assessment of the particularized facts of the purported employment relationship in question. As such, the case is unremarkable and does not warrant review by this Court.

B. *Petitioner's assertion of an implied exclusion for newspaper carriers is meritless and flies in the face of Congressional intent and well-settled rules of statutory construction.*

Section 2(3) of the Act, in defining the term "employee," expressly excludes from that definition the following classes of workers: (1) "agricultural laborer[s]"; (2) persons employed "in the domestic service of any family or person at his home"; (3) "any individual employed by his parent or spouse"; (4) "any individual having the status of an independent contractor"; (5) "any individual employed as a supervisor"; and (6) "any individual employed by an employer subject to the Railway Labor Act. . . ." 29 U.S.C. § 152(3). Conspicuously absent from this list is an exclusion for "newspaper carriers." This is telling, for it is well-settled that when Congress explicitly enumerates certain exceptions to a general definition, additional exceptions are not to be implied in the absence of clear legislative intent to the contrary. *See, e.g., American Bank & Trust Co. v. Dallas County*, —— U.S. ——, 103 S. Ct. 3369, 3375 (1983); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). *See also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive."). Although Petitioner seeks to persuade this Court to recognize an additional implied exclusion from Section 2(3)'s definition of "employee" for "newspaper carriers," it cites absolutely no legislative history to support such a radical alteration of the unambiguous language of the Act. Given this deficiency in Petitioner's

position, it appears appropriate to observe that "[t]he short answer is that Congress did not write the statute that way." *Russello v. United States*, —— U.S. ——, 104 S. Ct. 296, 300 (1983); *United States v. Naftalin*, 441 U.S. 768, 773 (1982).

The untenability of Petitioner's position is further exposed when one considers the context in which Congress amended Section 2(3) of the Act in 1947 to expressly exclude "independent contractor[s]." As noted earlier, Congress' action in enacting an explicit "independent contractor" exclusion from Section 2(3) was prompted by its strong denunciation of this Court's decision in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). There the Court had permitted the Board to stray from traditional common law agency principles in determining "employee" status under the Act and to rely instead upon amorphous conceptions of "policy." Congress responded swiftly by amending Section 2(3) to expressly exclude "independent contractor[s]" from the definition of "employee" and there can be no disputing that "[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). It is revealing indeed that Congress, in legislatively overriding the holding in *Hearst—a case directly addressing the legal status under the Act of newspaper distributors*—chose not to accomplish its purpose by explicitly excluding "newsboys" or "newspaper distributors" from the coverage of the Act, but instead chose to reaffirm the pre-eminent role of common law agency principles in distinguishing covered "employees" from uncovered "independent contractors." Furthermore, it is apparent that Congress was well aware of how to draft a newspaper distributor exemption to federal labor legislation when it chose to do so. *See* Section 13(d) of the Fair Labor Standards Act, 29 U.S.C § 213(d) ("The

provisions of sections 206, 207, and 212 of this title [pertaining to minimum wage, overtime and child labor restrictions, respectively] shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer. . . .").

Petitioner relies principally upon two cases, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), for the proposition that newspaper carriers are entitled to an implicit exclusion from the definition of "employee" in Section 2(3). Far from "controlling" the instant case as Petitioner contends (Pet. 11), neither case substantively supports Petitioner's position. In *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), this Court affirmed, as having a reasonable basis in law, the Board-created doctrine of excluding confidential employees with a "labor-nexus" from employee bargaining units. And, in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), this Court held simply that all employees properly classifiable as "managerial" were intended by Congress to be excluded from the definition of "employee" in Section 2(3). In both cases, this Court underscored the fact that its holdings were grounded in long-standing Board interpretations of the Act and compelled by Congressional intent as embodied in legislative histories.

By way of contrast, the long-standing Board approach to the newspaper carrier employee vs. independent contractor issue has been predicated upon a case-by-case adjudicatory process reliant upon common law agency principles. More fundamentally, the pertinent legislative history in the instant case unambiguously repels the contention that the common law agency principles which Congress intended would govern the employee vs. independent contractor question should be supplanted in the newspaper distribution context by an implicit statutory exclusion for newspapers carriers. It is telling that Peti-

tioner has failed to cite even one reference to Section 2(3)'s legislative history in support of its position.

II. The Rulings Below That The District Managers Are Statutory Supervisors Are Completely Consistent With Congressional Intent And Long-standing Board And Judicial Authority.

Section 2(3) expressly excludes from the statutory definition of "employee" ". . . any individual employed as a supervisor. . . ." 29 U.S.C. § 152(3). Moreover, Section 14(a) of the Act categorically proclaims that

> . . . no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees *for the purpose of any law, either national or local, relating to collective bargaining.*

29 U.S.C. § 164(a) (emphasis added). This Court, in analyzing the significance of Section 14(a) in *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association*, 382 U.S. 181, 189 (1965), concluded that its legislative history[11] reflected clearly that "Congress' propelling intention was to relieve employers from *any* compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees." (emphasis added).[12]

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[11] *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess., at 19 (1947) (Section 14(a) "prevents[s] employers [from] being compelled to accord supervisors the anomalous status of employees for the purposes of the Wagner Act."); H.R. Rep. No. 245, 80th Cong., 1st Sess., at 5, 14 (Section 14(a) "exempts supervisors from the compulsory features of the National Labor Relations Act.") ("The bill, by excluding foremen and other supervisory personnel from the definition of 'employee,' deprives the Board of jurisdiction over them."); *see also* comments of Senator Taft, co-author of the Act, on the operative impact of Section 14(a): "[Supervisors] do not have the protection of the National Labor Relations Act." 93 Cong. Rec. 3952 (1947).

[12] *Accord, Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918 (3d Cir. 1981); *District 2, Marine Engineers Beneficial Association*

Although Petitioner maintains that permitting an employer to upset an established bargaining relationship by challenging the legal status of that bargaining unit under the Act will unleash a parade of horribles debilitative of industrial stability, such a complaint—speculative at best—should be directed to Congress and not this Court. As written, *although Section 14(a) of the Act specifically permits employers to recognize and bargain with units of supervisors, it unambiguously and categorically removes any legal obligation on behalf of an employer to continue that relationship if undesired.* Thus, if the Company is to be denied the exercise of a statutorily granted freedom, such denial must originate with Congress through the amendment of Section 14(a). Additionally, it would be perverse indeed to now penalize the Company for simply having participated in permissive bargaining with the Petitioner over a six-year period since the Company's course of conduct enabled the Union to receive dues monies from the district managers for several years—thereby conferring upon the Union tangible benefits to which it had no statutory right. *See The Oakland Press Co.*, 266 N.L.R.B. 107, 108 (1983) ("As a result, the Union and its members benefitted from [the Company's] willingness, despite the lack of Board approval or certification, to enter into and until May, 1976 abide by collective bargaining agreements which covered the district managers.").

Moreover, it remains a firmly established tenet of labor law that the determination of whether an individual occupies a particular status under the Act is predicated upon an evaluation of whether that individual satisfies certain prescribed legal criteria under the Act, and an employer's past characterization of that individual's status necessarily is subordinated in significance to the dictates

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v. Amoco Oil Co., 554 F.2d 774, 778 (6th Cir. 1977); *Warner Co. v. NLRB*, 365 F.2d 435, 437 (3d Cir. 1966); *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 578 (6th Cir. 1965).

of the Act.[13] Accordingly, the Board historically has held that a pre-election agreement wherein, as here, an employer stipulated that certain workers were not "supervisors" does not preclude the employer from successfully contesting their status or inclusion in a bargaining unit at a subsequent date when continued inclusion of these workers in the unit would contravene the Act.[14] Moreover, it should be emphasized that the Board has maintained a strict fidelity to the above principle in cases in which bargaining histories of the affected units have been lengthy and the work duties of the individuals ultimately excluded have been unchanged. Indeed, in a recent newspaper unit clarification case reflecting a similar factual backdrop, the Board held that notwithstanding the fact that the employer and union had long recognized certain positions as properly includible within the bargaining unit and that the job responsibilities of the workers occupying these positions had not been altered, the Board was compelled to exclude from the unit as supervisors various positions since continued inclusion in the unit would violate fundamental policies of the Act. The Board's reasoning, excerpted below in pertinent part and reflecting solidly grounded legal principles, likewise controls the disposition of the instant case:

> The Act provides specifically for the exclusion of "supervisors." * * * Thus, except in certain limited

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[13] *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 n.19 (1974); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1066 (4th Cir. 1982); *NLRB v. Wilson-Crissman Cadillac*, 654 F.2d 728, 730 (6th Cir. 1981); *Walla Walla Union Bulletin v. NLRB*, 631 F.2d 609, 613 (9th Cir. 1980); *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976); *Mid-Continent Refrigerated Service Co.*, 228 N.L.R.B. 917, 920 (1977).

[14] *The Oakland Press Co.*, 266 N.L.R.B. 107, 108 (1983); *Esten Dyeing & Finishing Co., Inc.*, 219 N.L.R.B. 286 (1975); *Fisher-New Center Co.*, 184 N.L.R.B. 809 (1970); *Times-World Corp.*, 151 N.L.R.B. 947 (1965); *Lake Huron Broadcasting Corp.*, 130 N.L.R.B. 908 (1961).

> and well-defined factual situations, the Board, when presented with an appropriate petition or claim, is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the principles of the Act. *While it may be that certain of the positions sought to be excluded have long been included under previous contracts, and the job duties of those positions have remained unchanged, nonetheless, if it can be shown that the persons in such positions meet the test for establishing supervisory . . . status, we are compelled to exclude them.*

Washington Post Company, 254 N.L.R.B. 168, 169 (1981) (emphasis added; footnotes omitted).[15]

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[15] The Board in *Washington Post Company* cites as illustrative authority for its above ruling the case of *Brotherhood of Locomotive Firemen and Engineers*, 145 N.L.R.B. 1521 (1964). In that case, employees that had been recognized as occupying unit positions for over forty years by the parties and whose job responsibilities had not been modified significantly during that period were sought to be excluded as supervisors by the employer. The union argued for denial of the exclusion requests on the ground that the parties' lengthy collective bargaining history barred subsequent restructuring of the unit. The Board was unpersuaded; it held that although "in certain circumstances when determining the scope of the appropriate unit weight is given to bargaining history and to the prior agreements of the parties such factors are not determinative of the status of disputed employee categories whose exclusion may be required because of the statute or for policy reasons." 145 N.L.R.B. at 1525 n. 10. *See also The Western Colorado Power Co.*, 190 N.L.R.B. 564 (1971) (30-year bargaining history; employer sought exclusion of 133 employees as supervisors; all but five employees deemed excluded); *A.D.T. Company, Inc.*, 177 N.L.R.B. 704 (1969) (30-year bargaining history; employer sought exclusion of 94 individuals as supervisors; Board excluded district inspectors, foremen and plant supervisors).

CONCLUSION

For the foregoing reasons, Respondent The Oakland Press Company respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

At the time the instant suit was filed and through the present, respondent has been, and remains, a Michigan corporation, and a wholly-owned subsidiary of Capital Cities Communications, Inc., of New York.

The following enterprises are operating divisions of Capital Cities Communications, Inc.: WPVI-TV, Philadelphia; WKBW-TV, Buffalo; WTNH-TV, New Haven; WTVD-TV, Durham-Raleigh; KFSN-TV, Fresno; WPAT AM-FM, Paterson, N.J.; KLAC-AM and KLAC-FM, Los Angeles; WJR AM-FM, Detroit; WKBW AM, Buffalo; WPRO AM-FM, Providence; Sutton Industries, Mission Viejo, Cal.; *Albany Democrat-Herald*, Albany, Ore.; *Daily Tidings*, Ashland, Ore.; *Gresham Outlook*, Gresham, Ore.; *Springfield News*, Springfield, Ore.; *Cottage Grove Sentinel*, Cottage Grove, Ore.; *Lebanon Express*, Lebanon, Ore.; *Sandy Post*, Sandy, Ore.; *Stamp Collector* magazine; *Stamp Wholesaler* magazine.

The following companies are subsidiary corporations of Capital Cities Communications, Inc.; where a subsidiary is itself a parent corporation, the name of its subsidiaries are noted parenthetically: Oakland Press Co., Pontiac, Mich.; The Kansas City Star Company, Kansas City, Mo.; Capital Cities of Kansas, Inc. (parent of Pennypower Shopping News, Inc.); Capital Cities Properties, Inc.; Tampa Bay TV (WFTS-TV), Tampa, Fl.; WBAT-KSCS, Inc., Fort Worth, Tex.; KTRK, Inc., Houston, Tex.; Star Telegram, Inc., Fort Worth, Tex.; Institutional Investor, Inc., New York, New York; Securities Data Co., New York, New York; Wilson Publishing Co., Narragansett, Rhode Island; Capital Cities Cable of Albuquerque, Inc. (parent of Sandoval County Cable Television, Inc.); Capital Cities Cable of Ohio, Inc. (parent of Marks Cablevision of Green, Inc.); Capital Cities Cable of Indiana, Inc.; Coastal Bend Cablevision Corp.; Clear Cablevision, Inc.; Omnicom Cablevision of Illinois,

Inc.; Omnicom of Michigan, Inc.; Pacific Cable, Inc.; Capital Cities Cable, Inc. (parent of Cablecom-General, Inc.; Cablecom-General, Inc. is the parent of Tele Hi Fi, Inc. and Mid-Kansas, Inc.).

Capital Cities Media, Inc. is a wholly-owned subsidiary of Capital Cities Communications, Inc. Other operating divisions of Capital Cities Media, Inc. include Fairchild Publications, the Highland (Ill.) Highland News Leader, the Gilford (Conn.) Shore Line Newspapers, and the Belleville (Ill.) *News-Democrat*; Capital Cities Vision, Inc.; the Red Bank (N.J.) *Red Bank Register*, and Toms River (N.J.) Toms River Publishing are wholly-owned subsidiaries of Capital Cities Media, Inc.